

DIRECTORS' LIABILITY REFORM BILL

EXPLANATORY MEMORANDUM

Overview of the Bill

The Directors' Liability Reform Bill makes amendments to limit and standardise provisions which impose personal criminal liability on directors for corporate offending. In so doing it fulfils Western Australia's commitment to directors' liability reform, which is a Council of Australian Governments (COAG) reform project which was included in the National Partnership Agreement to Deliver a Seamless National Economy.

Part 1: Preliminary

Clause 1 – Short title

This clause provides that the short title is the Directors' Liability Reform Act 2014.

Clause 2 – Commencement

This clause provides that Part 1 of the Act will come into operation on the day the Act receives the Royal Assent, and that the rest of the Act will come into operation on a day fixed by proclamation, and that different days may be fixed for different provisions.

Part 2: The *Criminal Code* amended

Clause 3 – Act amended

This clause provides that this Part amends the *Criminal Code*.

Clause 4 – Part I Chapter VI inserted

This clause inserts a new proposed Chapter VI of the *Criminal Code*, which includes sections 44A, 44B, 44C, 44D, 44E, 44F and 44G.

Proposed section 44A(1) provides that the Chapter contains a set of standard provisions (sections 44C, 44D and 44E) that set out certain circumstances in which directors and other officers of a body corporate can incur criminal liability as a result of an offence by the body corporate.

Proposed section 44A(2) provides that only one of sections 44C, 44D and 44E can apply to an offence.

Section 44B provides that in this Chapter, 'officer', in relation to a body corporate, has the meaning given in section 9 of the *Corporations Act 2001* (Cth). Where the Bill proposes to amend other Acts, provisions in those Acts which contain definitions of 'officer' are proposed to be deleted.

Proposed section 44C provides for the liability of officers for corporate offences where the onus is on the prosecution to prove reasonable steps were not taken.

Proposed section 44C(1) provides that the section applies to an offence only if a provision of the *Criminal Code*, or of another written law, expressly provides that it applies to the offence.

Proposed section 44C(2) provides that if a body corporate is guilty of an offence to which section 44C applies, an officer of the body corporate is also guilty of the offence if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate. It is intended that, if it is established that there were no reasonable steps an officer could have taken, the officer should be acquitted.

Proposed section 44C(3) prescribes the factors to which a court must have regard in determining whether things done or omitted to be done by the officer constitute reasonable steps. These are:

- a) what the officer knew, or ought to have known, about the commission of the offence by the body corporate; and
- b) whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and
- c) any other relevant matter.

Proposed section 44D provides for the liability of officers for corporate offences where the onus is on the prosecution to prove that all reasonable steps were not taken, if evidence suggesting such steps were taken is adduced by or on behalf of the officer.

Proposed section 44D(1) provides that the section applies to an offence only if a provision of the *Criminal Code*, or of another written law, expressly provides that it applies to the offence.

Proposed section 44D(2) provides that if a body corporate is guilty of an offence to which section 44D applies, an officer of the body corporate is also guilty if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

Proposed section 44D(3) provides that if the officer adduces evidence that suggests a reasonable possibility that the officer took all reasonable steps to prevent the commission of the offence by the body corporate, the prosecution then bears the onus of proving the contrary. The officer therefore bears an evidential burden. It is intended that, if it is established that there were no reasonable steps an officer could have taken, the officer should be acquitted.

Proposed section 44D(4) prescribes the factors to which a court must have regard in determining whether things done or omitted to be done by the officer constitute reasonable steps. These are:

- a) what the officer knew, or ought to have known, about the commission of the offence by the body corporate; and
- b) whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and
- c) any other relevant matter.

Proposed section 44E provides for the liability of officers for corporate offences where the onus is on the officer to prove that reasonable steps were taken.

Proposed section 44E(1) provides that the section applies to an offence only if a provision of the *Criminal Code*, or of another written law, expressly provides that it applies to the offence.

Proposed section 44E(2) provides that if a body corporate is guilty of an offence to which section 44E applies, an officer of the body corporate is also guilty of the offence if the officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

Proposed section 44E(3) provides that the officer bears the onus of proving that the officer took all reasonable steps to prevent the commission of the offence by the body corporate. It

is intended that, if it is established that there were no reasonable steps an officer could have taken, the officer should be acquitted.

Proposed section 44E(4) prescribes the factors to which a court must have regard in determining whether things done or omitted to be done by the officer constitute reasonable steps. These are:

- a) what the officer knew, or ought to have known, about the commission of the offence by the body corporate; and
- b) whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and
- c) any other relevant matter.

Proposed section 44F(1) provides that proposed Chapter VI of the *Criminal Code* does not affect the liability of a body corporate for any offence. Where the Bill proposes to amend other Acts, provisions in those Acts which are in the same terms as section 44F(1) are deleted on the basis that they will be redundant when the Directors' Liability Reform Act comes into operation.

Proposed section 44F(2) provides that Chapter VI of the *Criminal Code* does not affect the liability of an officer, or any other person, under Chapters II, LVII, LVIII and LIX of the *Criminal Code*. These chapters contain provisions relating to what is commonly referred to as accessory liability, and section 44F(2) therefore provides that the inclusion of Chapter VI will not affect the liability of officers of bodies corporate who are parties to offences committed by bodies corporate (as distinct from officers who are liable due to a failure to take all reasonable steps to prevent corporate offending). Where the Bill deletes provisions in other Acts which impose accessory liability, it is not intended that this deletion should affect the ability to prosecute officers of bodies corporate, who have been parties to offences under those Acts, under Chapters II, LVII, LVIII and LIX of the *Criminal Code*.

Proposed section 44F(3) provides that an officer of a body corporate may be charged with, and convicted of, an offence in accordance with section 44C, 44D or 44E of the *Criminal Code* whether or not the body corporate is charged with or convicted of the offence. Where the Bill proposes to amend other Acts, provisions in those Acts which are in the same terms as section 44F(3) are deleted on the basis that they will be redundant when the Directors' Liability Reform Act comes into operation.

Proposed section 44F(4) provides that if an officer of a body corporate who is charged with an offence in accordance with section 44C, 44D or 44E claims that the body corporate would have a defence if it were charged with the offence, the officer bears the onus of proving the defence. This section also provides that the standard of proof required is the standard that would apply to the body corporate in relation to the defence.

Proposed section 44F(5) provides that section 44F(4) does not limit any other defence available to the officer.

Proposed sections 44G(1) and (2) provide that if section 44C, 44D or 44E applies to an offence in respect of which penalties are only specified for bodies corporate, the penalty for the offence if committed by an officer of the body corporate is one-fifth of the maximum penalty that could be imposed on the body corporate. Proposed section 44G(3) also provides that this section does not limit the *Sentencing Act 1995*.

Part 3: Amendments to other Acts

Part 3 of the Bill contains 60 divisions. Each of these divisions amends a Western Australian Act that currently imposes personal criminal liability on directors for corporate fault, either by deleting the relevant provisions to remove this form of liability from the Act or by replacing the relevant provisions with provisions that incorporate the standard provisions in sections 44C or 44E of the *Criminal Code*.

Division 1

This Division amends the *Aboriginal Heritage Act 1972* by deleting section 57(2) and inserting a new proposed section 58 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 2

This Division amends the *Animal Welfare Act 2002*. First, it deletes section 80 and inserts a new proposed section 80 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Second, this Division inserts a new proposed section 81A which provides for the liability of officers of unincorporated scientific establishments. Proposed section 81A(1) provides that in this section 'officer', in relation to a scientific establishment that is neither an individual nor a body corporate, has the meaning given in section 9 of the *Corporations Act 2001* (Cth).

Proposed section 81A(2) provides that if a licence is issued in respect of a scientific establishment that is neither an individual nor a body corporate, every officer of the scientific establishment has the same rights and duties as a licensee, whether or not the officer is named on the licence.

Proposed section 81A(3) provides that if a licence is issued in respect of a scientific establishment that is neither an individual nor a body corporate, and an officer of the establishment (the 'principal officer') commits an offence under the *Animal Welfare Act 2002* (other than an offence under Part 3 that is unrelated to the activity authorised by the licence), each other officer of the establishment also commits the offence if that officer failed to take all reasonable steps to prevent the commission of the offence by the principal officer.

Proposed section 81A(4) provides that in determining whether things done or omitted to be done by the officer constitute reasonable steps, a court must have regard to what the officer knew, or ought to have known, about the commission of the offence by the principal officer; and whether the officer was in a position to influence the conduct of the principal officer in relation to the commission of the offence; and any other relevant matter.

Division 3

This Division amends the *Anzac Day Act 1960* by deleting parts of sections 4(4), 5(2), 6(4) and 7(2).

This Division does not affect any penalties provided for in the *Anzac Day Act 1960*, and will not prevent prosecutions of racing clubs which have committed offences under the Act. It will simply remove the current imposition of liability on every single member of a club's body or managing committee for offences committed by a club.

Section 4(4) of the Act currently reads:

'If any race meeting is held on Anzac Day in any year in contravention of the provisions of this section, the person or racing club by or on behalf of whom or which the race meeting

was held, and each member of the managing body or committee of that racing club, commits an offence and is liable to a penalty not exceeding \$400.'

Following the amendments, this will read:

'If any race meeting is held on Anzac Day in any year in contravention of the provisions of this section, the person or racing club by or on behalf of whom or which the race meeting was held commits an offence and is liable to a penalty not exceeding \$400.'

Section 5(2) currently reads:

'If the person or racing club by or on behalf of whom or which a race meeting is held on Anzac Day fails to furnish the return required under the provisions of subsection (1), or to pay to the Trust the net proceeds derived from the race meeting in accordance with that subsection, that person or racing club, and each member of the managing body or committee of that racing club, commits an offence and is liable to a penalty not exceeding \$400.'

Following the amendments, this will read:

'If the person or racing club by or on behalf of whom or which a race meeting is held on Anzac Day fails to furnish the return required under the provisions of subsection (1), or to pay to the Trust the net proceeds derived from the race meeting in accordance with that subsection, that person or racing club commits an offence and is liable to a penalty not exceeding \$400.'

Section 6(4) currently reads:

'If any sports are held on Anzac Day in any year in contravention of this section, the person, club, association or body by or on behalf of whom or which those sports were so held, and each member of the managing body or committee of that club, association or body, commits an offence and is liable to a penalty not exceeding \$400.'

Following the amendments, this will read:

'If any sports are held on Anzac Day in any year in contravention of this section, the person, club, association or body by or on behalf of whom or which those sports were so held commits an offence and is liable to a penalty not exceeding \$400.'

Section 7(2) currently reads:

'If the person, club, association or body by or on behalf of whom or which sports are held on Anzac Day fails to furnish the return required under subsection (1), or to pay to the Trust the net proceeds derived from the holding of those sports in accordance with that subsection, that person, club, association or body, and each member of its managing body or committee, commits an offence and is liable to a penalty not exceeding \$400, but no such member is liable if it is shown that such failure occurred without his knowledge or approval.'

Following the amendments, this will read:

'If the person, club, association or body by or on behalf of whom or which sports are held on Anzac Day fails to furnish the return required under subsection (1), or to pay to the Trust the net proceeds derived from the holding of those sports in accordance with that subsection, that person, club, association or body commits an offence and is liable to a penalty not exceeding \$400.'

Division 4

This Division amends the *Architects Act 2004* by deleting section 76 and inserting a new proposed section 76 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 5

This Division amends the *Auction Sales Act 1973* by deleting section 35(4).

Division 6

This Division amends the *Betting Control Act 1954* by deleting sections 27G and 27H(3) and inserting a new proposed section 27G which provides that section 44C of the *Criminal Code* applies to certain offences in the Act. The heading to section 27H is also amended to reflect the deletion made.

Division 7

This Division amends the *Biosecurity and Agriculture Management Act 2007* by deleting section 110 and inserting a new proposed section 110 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 8

This Division amends the *Building Services (Complaint Resolution and Administration) Act 2011* by deleting section 105 and inserting a new proposed section 105 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 9

This Division amends the *Building Services (Registration) Act 2011* by deleting section 97 and inserting a new proposed section 97 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 10

This Division amends the *Charitable Collections Act 1946* by deleting section 15(4) and inserting a new proposed section 16A which provides that section 44C of the *Criminal Code* applies to an offence under section 15(3) of the Act.

Division 11

This Division amends the *Criminal Procedure Act 2004* by deleting section 180 and inserting a new proposed section 180 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 12

This Division amends the *Dangerous Goods Safety Act 2004* by deleting section 61 and inserting a new proposed section 61 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 13

This Division amends the *Debt Collectors Licensing Act 1964* by deleting section 23.

Division 14

This Division amends the *Emergency Management Act 2005* by deleting section 98.

Division 15

This Division amends the *Employment Agents Act 1976* by deleting section 30(3).

Division 16

This Division amends the *Energy Operators (Powers) Act 1979* by deleting sections 86(1), 86(2) and 86(2a).

Division 17

This Division amends the *Energy Safety Act 2006* by deleting section 35.

Division 18

This Division amends the *Environmental Protection Act 1986* by deleting sections 118(1), 118(2) and 118(3) and inserting a new proposed section 119A which provides that section 44E of the *Criminal Code* applies to Tier 1 and Tier 2 offences in the Act. This Division also changes the heading of section 118 to reflect the deletions made.

Division 19

This Division amends the *Exotic Diseases of Animals Act 1993* by deleting section 58 and inserting a new proposed section 58 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 20

This Division amends the *Fair Trading Act 2010* by deleting sections 95(1), 95(2) and 95(3) of the Act and inserting a new section 95A which provides that section 44C of the *Criminal Code* applies to offences in the Act. This Division also changes the heading of section 95 to reflect the deletions made.

Division 21

This Division amends the *Firearms Act 1973* by deleting section 21B(1)(a); deleting the word 'each' in section 21B(1)(b) and replacing it with 'the person'; and deleting section 21B(2), section 21B(3), and section 21B(4).

Division 21 also inserts a new proposed section 21C which provides that section 44C of the *Criminal Code* applies to offences under certain provisions of the *Firearms Act 1973*, when the offences are committed in the course of the business carried on under a Dealer's Licence, a Repairer's Licence or a Manufacturer's Licence.

Division 22

This Division amends the *Fish Resources Management Act 1994* by deleting section 204 and inserting a new proposed section 204 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 23

This Division amends the *Food Act 2008* by deleting section 128 and inserting a new proposed section 128 which provides that section 44C of the *Criminal Code* applies to an offence under section 22(1) of the Act and that section 44E of the *Criminal Code* applies to certain other offences in the Act.

Division 24

This Division amends the *Gaming and Wagering Commission Act 1987* by deleting section 37 and inserting a new proposed section 37 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act. This Division also amends section 99(d) by replacing the words 'who pursuant to section 37 would be liable in relation to a conviction of that body for an offence of failing to pay those moneys on demand' with 'who, if that body committed an offence of failing to pay those moneys on demand, would be criminally liable in accordance with *The Criminal Code* section 44C.'

Division 25

This Division amends the *Gas Corporation (Business Disposal) Act 1999* by deleting section 13.

Division 26

This Division amends the *Gold Corporation Act 1987* by deleting section 76.

Division 27

This Division amends the *Heritage of Western Australia Act 1990* by deleting sections 68(2) and (3) and inserting a new proposed section 69A which provides that section 44C of the *Criminal Code* applies to certain offences in the Act. This Division also amends section 70(3) to insert a reference to the new proposed section 69A.

Division 28

This Division amends the *Home Building Contracts Act 1991* by deleting section 30 and inserting a new proposed section 30 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 29

This Division amends the *Hope Valley-Wattleup Redevelopment Act 2000* by deleting section 30.

Division 30

This Division amends the *Hospitals and Health Services Act 1927* by deleting section 26M and inserting a new proposed section 26M which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 31

This Division amends the *Liquor Control Act 1988* by deleting section 164(1)(a); amending section 164(1)(b) by deleting the word 'each' and replacing it with 'the manager'; and inserting a new proposed section 165A which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 31 also amends sections 96(3) and 167(2)(b) to insert references to the new proposed section 165A.

Division 32

This Division amends the *Litter Act 1979* by deleting section 24C.

Division 33

This Division amends the *Major Events (Aerial Advertising) Act 2009* by deleting section 16 and inserting a new proposed section 16 which provides that section 44C of the *Criminal Code* applies to an offence under section 11(1) of the Act. This Division also deletes the definition of 'officer' in section 3.

Division 34

This Division amends the *Marketing of Potatoes Act 1946* by deleting section 41A.

Division 35

This Division amends the *Medicines and Poisons Act 2014* by deleting section 118 and inserting a new proposed section 118 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act, and that section 44E applies to certain other offences in the Act.

Division 36

This Division amends the *Metropolitan Redevelopment Authority Act 2011* by deleting section 129.

Division 37

This Division amends the *Mines Safety and Inspection Act 1994*.

This Division deletes sections 100 and 100A and inserts a new proposed section 100. Proposed section 100(1) provides that section 44C of the *Criminal Code* applies to an offence under a provision listed in Table A.

The new proposed section 100(2) provides that where a body corporate commits an offence under a provision listed in Table B, and an officer of the body corporate (as defined in section 44B of the *Criminal Code*) knew that the commission of the offence would be likely to cause the death of, or serious harm to, a person to whom a duty was owed, section 44C of the *Criminal Code* applies to the offence in relation to that officer.

The new proposed section 100(3) provides that where a body corporate commits an offence under a provision listed in Table B ('the principal offence'), and an officer of the body corporate (as defined in section 44B of the *Criminal Code*) did not know that the commission of the offence would be likely to cause the death of, or serious harm to, a person to whom a duty was owed, then section 44C of the *Criminal Code* applies to the principal offence but section 44C is modified so that an officer of the body corporate is not liable to the penalty for the principal offence but instead is liable to the penalty under the relevant alternate offence as set out in the list in proposed section 100(3)(b).

This Division also amends section 4(4) to remove a reference to section 100A(2)(a)(iii) and insert a reference to section 100(2)(b).

Division 38

This Division amends the *Mining Act 1978* by deleting section 154(3) and inserting a proposed new section 154A which provides that section 44C of the *Criminal Code* applies to an offence under section 155(1) of the Act.

Division 39

This Division amends the *Misuse of Drugs Act 1981* by deleting section 35 and inserting a new proposed section 35 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 40

This Division amends the *Nuclear Waste Storage and Transportation (Prohibition) Act 1999* by deleting section 8 and inserting a proposed new section 8 which provides that section 44C of the *Criminal Code* applies to an offence under section 7(2) or section 7A(2) of the Act.

Division 41

This Division amends the *Pawnbrokers and Second-hand Dealers Act 1994* by deleting section 89(3) and amending section 89(4) by deleting the words 'licensee and the defence available to an officer under subsection (3) is not available to an officer who is also the licensee' and replacing them with the word 'licensee'. This Division also amends the heading to section 89 to reflect these deletions.

Division 42

This Division amends the *Pearling Act 1990* by deleting section 56 and inserting a proposed new section 56 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 43

This Division amends the *Perry Lakes Redevelopment Act 2005* by deleting section 50.

Division 44

This Division amends the *Pharmacy Act 2010* by deleting section 71 and inserting a proposed new section 71 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 45

This Division amends the *Radiation Safety Act 1975* by deleting section 56(4) and inserting a proposed new section 57A which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 46

This Division amends the *Rail Safety Act 2010* by deleting section 189(2) and inserting a new proposed section 190A, which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 46 also deletes the definition of 'officer' in section 189(1), amends section 189(5) to delete a reference to section 189(2), deletes the words 'body corporate or other' in section 189(7), and deletes 189(9)(a). The Division also amends the heading to section 189 to reflect the deletions made.

Division 47

This Division amends the *Retail Trading Hours Act 1987* by deleting section 34.

Division 48

This Division amends the *Retirement Villages Act 1992* by deleting section 79 and inserting a proposed new section 79 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 49

This Division amends the *Security and Related Activities (Control) Act 1996* by deleting section 90, and by deleting references to section 90 in sections 88A(1) and section 89(3).

Division 50

This Division amends the *Surveillance Devices Act 1998* by deleting section 39.

Division 51

This Division amends the *Swan and Canning Rivers Management Act 2006* by deleting sections 121(1), 121(2) and 121(3) and inserting a proposed new section 122A which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

This Division also amends the heading to section 121 to reflect the deletions made.

Division 52

This Division amends the *Taxation Administration Act 2003* by deleting section 109 and inserting a proposed new section 109 which provides that section 44C of the *Criminal Code* applies to certain offences in the *Duties Act 2008*, the *Land Tax Assessment Act 2002*, the *Pay-roll Tax Assessment Act 2002*, the *Stamp Act 1921* and the *Taxation Assessment Act*

2003, and also provides that section 44E of the *Criminal Code* applies to certain other offences in the *Stamp Act 1921* and the *Taxation Administration Act 2003*.

Division 53

This Division amends the *Tobacco Products Control Act 2006* by deleting section 109 and inserting a proposed new section 109 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act and that section 44E of the *Criminal Code* applies to certain other offences in the Act.

This Division also deletes the definition of 'officer' in the Glossary.

Division 54

This Division amends the *Transport Co-ordination Act 1966* by deleting section 55A.

Division 55

This Division amends the *Unauthorised Documents Act 1961* by deleting section 6.

Division 56

This Division amends the *Veterinary Chemical Control and Animal Feeding Stuffs Act 1976* by deleting section 61(1) and inserting a new proposed section 62A which provides that section 44C of the *Criminal Code* applies to certain offences in the Act. This Division also amends the heading to section 61 to reflect the deletion made.

Division 57

This Division amends the *Water Services Act 2012* by deleting section 196 and inserting a proposed new section 196 which provides that section 44C of the *Criminal Code* applies to certain offences in the Act.

Division 58

This Division amends the *Waterways Conservation Act 1976* by deleting section 73(1).

Division 59

This Division amends the *Western Australian Products Symbol Act 1972* by deleting section 13.

Division 60

This Division amends the *Workers' Compensation and Injury Management Act 1981* by deleting sections 170(5) and (6) and inserting a new proposed section 171A, which provides that section 44C of the *Criminal Code* applies to an offence under section 170(1).

The Division also inserts a new proposed section 170(6), which provides that in subsections 170(2b) and 170(2c), 'responsible officer', in relation to the commission of an offence by a body corporate, means a person who is convicted of the offence in accordance with section 44C of the *Criminal Code*.

This Division also amends section 170(2b) to delete a reference to section 170(5).